IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

VICTORIA D.,	)	
	)	2 CA-JV 2007-0003
Appellant,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
ARIZONA DEPARTMENT OF ECONOMIC SECURITY and JOHNATHAN H.,	)	Rule 28, Rules of Civil Appellate Procedure
	)	
Appellees.	)	

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. JD200500040

Honorable Ann R. Littrell, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 Appellant Victoria D. appeals from the juvenile court's December 2006 order terminating her parental rights to her son, Johnathan H., born in 2005.[1] Granting a motion for summary judgment filed by the Arizona Department of Economic Security (ADES), the juvenile court severed Victoria's parental rights on the ground of abandonment. A.R.S. § 8-533(B)(1). On appeal, Victoria argues that the juvenile court erred in finding no issue of material fact and improperly weighed the evidence in granting summary judgment. Because Victoria failed to show there was any disputed issue of material fact, we affirm.

¶2 Although a juvenile court may resolve a termination proceeding by summary judgment, Rule 46(D), Ariz. R. P. Juv. Ct., 17B A.R.S., it must do so "under the well-tested summary judgment rules and case law." *Kenneth T. v. Ariz. Dep't of Econ. Sec.*, 212 Ariz. 150, ¶ 11, 128 P.3d 773, 775 (App. 2006). In reviewing the juvenile court's granting of summary judgment, we view the evidence in the light most favorable to Victoria, the party opposing summary judgment. *See Ancell v. Union Station Assocs.*, 166 Ariz. 457, 458, 803 P.2d 450, 451 (App. 1990). As we stated in *Jennifer G. v. Arizona Department of Economic Security*, 211 Ariz. 450, ¶ 23, 123 P.3d 186, 192 (App. 2005), ADES was "not entitled to summary judgment . . . [if] material issues of fact could not be resolved without credibility determinations and weighing of evidence." We review de novo the juvenile court's order granting summary judgment and apply the same standards the juvenile court

[1]Although the juvenile court also terminated the father's parental rights to Johnathan, he is not a party to this appeal.

was required to apply. *Id.* ¶ 14. Summary judgment should not be granted if there is more than a scintilla of evidence creating a disputed question of material fact. *See Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). A termination order may be affirmed on appeal so long as clear and convincing evidence supports at least one of the statutory grounds set forth in A.R.S. § 8-533 and there is proof by a preponderance of the evidence that termination is in the best interest of the child.[2] *See Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 22, 110 P.3d 1013, 1018 (2005).

¶3 ADES removed Johnathan from Victoria's care when he was born in 2005, after both mother and child tested positive for methamphetamine. A few weeks later, ADES attempted to reunite Victoria and Johnathan in a supervised treatment facility but again removed Johnathan from Victoria's care because she continued to use methamphetamine in the facility. In July 2005, the juvenile court adjudicated Johnathan dependent as to Victoria based on substance abuse and neglect. Pursuant to an initial plan of reunification, ADES offered Victoria services that included random urinalysis testing, drug assessment and treatment, visits with Johnathan five days per week, and assistance with transportation.

¶4 With the exception of one month, Victoria was homeless and unemployed from mid-June 2005 until February 2006, when she was incarcerated and ultimately sentenced to concurrent prison terms, the longest of which was 1.5 years. Although ADES

[2]Victoria does not dispute the juvenile court's finding that severance was in Johnathan's best interest.

made visits with Johnathan available up until Victoria's incarceration, she saw Johnathan only three times (in July and August 2005) after he was removed from her care in June 2005. Victoria did contact her caseworker in November 2005 to request a visit with Johnathan before turning herself in to her probation officer, but was unwilling to provide the caseworker with any means of contacting her, and the visit never took place. Victoria did not attend scheduled appointments with her caseworker in February 2006, nor did she initially advise the caseworker that the reason she had failed to show up for scheduled meetings was because she was having transportation problems. Moreover, even when she did inform her caseworker about her transportation problems, she declined the transportation assistance the caseworker offered. At a hearing in May 2006, the juvenile court approved a case plan for severance and adoption.

¶5 ADES filed an amended motion to terminate both parents' rights in July 2006, alleging the following as to Victoria: she was unable to care for Johnathan because of chronic substance abuse or mental illness that was likely to continue for a prolonged indeterminate period; Johnathan had been cared for in an out-of-home placement pursuant to court order for nine months or longer, and Victoria had substantially neglected or wilfully refused to remedy the circumstances that caused him to remain out of the home; Johnathan would be deprived of a normal home for a period of years because of Victoria's incarceration; and Victoria had abandoned Johnathan. *See* § 8-533(B)(3), (B)(8)(a), (B)(4),

and (B)(1). ADES also alleged that termination of the parents' rights was in Johnathan's best interest.

¶6 ADES filed a motion for summary judgment in June 2006 based on all of the grounds set forth in the motion to terminate, in which Johnathan joined. Although she opposed the motion, Victoria admitted most of the 108 enumerated facts ADES relied upon in support of its motion. ADES filed the affidavit of Victoria's case manager, Victoria's deposition transcript, and numerous other exhibits in support of its motion. Following a hearing in October 2006, the juvenile court granted ADES's motion for summary judgment, finding no genuine issue of material fact and that ADES had proved by uncontested, clear, and convincing evidence that Victoria had abandoned Johnathan and by a preponderance of the evidence that severance was in his best interest. Section 8-531(1), A.R.S., defines abandonment as follows.

> "Abandonment" means the failure of a parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision. Abandonment includes a judicial finding that a parent has made only minimal efforts to support and communicate with the child. Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment.

¶7 "[A]bandonment is measured not by a parent's subjective intent, but by the parent's conduct . . . ." *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 18, 995 P.2d 682, 685 (2000). What constitutes reasonable support, regular contact, and normal supervision within the meaning of abandonment pursuant to § 8-531(1), is fact-dependent.

In ruling that the uncontested facts showed by clear and convincing evidence a prima facie case of abandonment, the juvenile court made these findings.

> [Victoria] failed to provide reasonable support and to maintain regular contact with the child, including providing normal supervision. [Victoria] has paid no support, sent no cards, gifts, letters, nor made any contact whatsoever with the child since July 19, 2006. It is the mother's conduct, not her subjective intent, that controls the Court's finding of abandonment pursuant to the statutory definition contained in A.R.S. § 8-531. From June 2, 2005, the Department gave the mother the opportunity to visit the child daily, she understood and agreed to comply with the visitation services and agreed that transportation was available. By her own admission during this time, she "was worried more about my dope than my baby." She disappeared from August 2005 through November 2005, then requested visitation, admitting that she was "on the run" from her probation officer. From November 2005 through January 2006, the Department set up visits for her but she failed to show up for the visits, claiming transportation problems; however, her excuses are "too little, too late." The mother made no contact, nor did she attempt to contact the case manager or child even after she was placed in Cochise County Jail in February 2006, until May 23, 2006, more that one year after the birth of the child and five days after the Department filed the Motion to [T]erminate her parental rights.[3] The Court's findings are based on uncontested facts, that the mother

[3]Both Victoria and ADES have acknowledged that Victoria called her caseworker from the jail, although she did not leave a message telling the caseworker where she was. Although the juvenile court mistakenly found that Victoria did not attempt to contact her caseworker from the jail, this single attempt to contact the case manager without leaving a method of contacting her does not create a genuine issue of material fact sufficient to withstand summary judgment based on abandonment, nor could a reasonable jury find that it constituted the "reasonable support . . . regular contact . . . [or] normal supervision" § 8-531(1) requires.

exercised only three visits from June 2, 2005 until July 1, 2005[4] and failed to visit after that date.

¶8 Victoria argues on appeal that the juvenile court weighed the "disputed" evidence whether she "was provided with sufficient services to succeed in reunification with her son" and that it chose to believe ADES rather than her.[5] But a finding that ADES failed to provide appropriate reunification services is not required when a parent's rights are terminated on the ground of abandonment. *See* A.R.S. § 8-533(C). We nevertheless consider Victoria's argument in the limited context whether a question of material fact existed as to the elements necessary to establish a prima facie case of abandonment sufficient to withstand a motion for summary judgment.

¶9 At the hearing on ADES's motion for summary judgment, the juvenile court accurately noted that Victoria had stated in her deposition that she did not mention any transportation problems to her caseworker until "after six months, and she had been having no contact or no attempt to contact the child or the case manager for all those many months." Moreover, as Victoria also stated in her deposition, when she ultimately told her caseworker she had transportation problems, she declined to accept the transportation

[4]The juvenile court apparently meant August 2005, rather than July 1, 2005, a fact it correctly noted later in the hearing.

[5]We note that, in light of the juvenile court's order granting severance based solely on abandonment, it is unclear why Victoria devoted so much of her opening brief to challenge other severance grounds the court did not rely on.

assistance the caseworker offered. Thus, any claim Victoria raises that the transportation issue created a disputed issue of material fact is negated by the record.

¶10 The juvenile court thus concluded, based on the uncontested evidence before it, that Victoria's conduct was "too little too late to avoid a [prima facie] finding of abandonment, given how little effort[] she had made to provide support, which was to maintain a regular communication or establish a parental relationship during the child's first year of life." The evidence was undisputed that Victoria had provided no reasonable support to Johnathan, either financial or emotional; she had failed to maintain regular contact with Johnathan from August 2005 until she was incarcerated in February 2006; and she had failed to maintain minimal contact by sending cards or letters to Johnathan once she was in prison. No reasonable jury could find otherwise.

¶11 Victoria also contends the juvenile court erred in granting summary judgment because "she had sent cards and letters to her son," an argument she presented in two supplemental statements of facts filed in support of her opposition to ADES's motion for summary judgment. The juvenile court correctly granted ADES's motion to strike the cards as "not relevant or material" to the issue of abandonment and as an "obvious attempt to create a question of fact where none exists." Victoria wrote the letters in July and August 2006, after ADES had filed the motion to terminate her parental rights and well after the six months required to establish a prima facie case of abandonment had elapsed. More importantly, Victoria argued at the summary judgment hearing that the cards were relevant

to show her intent not to abandon Johnathan, a factor the court does not consider in an abandonment determination. *See Michael J.*, 196 Ariz. 246, ¶ 18, 995 P.2d at 685. Despite Victoria's subjective intent to parent Johnathan in the future, her past conduct "speaks volumes." *Id*. ¶ 24.

¶12 We note suggestions in the record that the juvenile court may have engaged in some fact-finding in the context of a summary judgment. For example, the court characterized Victoria's efforts to establish a parent-child relationship as "too little too late." We disapproved of this practice in *Jennifer G.*, 211 Ariz. 450, ¶ 15, 123 P.3d at 190, and of the use of this very language more recently in *Margaret H. v. Arizona Department of Economic Security*, 214 Ariz. 101, ¶ 14, 148 P.3d 1174, 1178 (App. 2006). But the evidence here, although fact-intensive, was not as "peculiarly factual [in] nature" as the facts presented to support the findings based on § 8-533(B)(3) and (B)(8), mental illness/substance abuse and out-of-home placement, that were presented in *Margaret H.*, 214 Ariz. 101, ¶ 10, 148 P.3d at 1177. Unlike in *Margaret H.*, where the mother's "state of mind and anticipated conduct were at issue," *id*. ¶ 10, the facts presented to the juvenile court in this case were based on objectively verifiable evidence of Victoria's conduct, rather than her hopes and intentions, and were susceptible to only one inference, that Victoria simply did not maintain any reasonable support or regular contact with Johnathan. *See Michael J.*, 196 Ariz. 246, ¶ 18, 995 P.2d at 685-86. Victoria failed to present even a

scintilla of evidence as to a material question of fact sufficient to defeat ADES's motion for summary judgment. *See Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008.

¶13 The juvenile court did not err in granting ADES's motion for summary judgment; therefore, we affirm the court's order terminating Victoria's parental rights on the ground of abandonment.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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JOSEPH W. HOWARD, Judge